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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1265

WILLIAM J. FROMBACH,

Petitioner,

v.

GILBERT ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

ABRAHAM E. FREEDMAN,
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GILBERT ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, William J. Frombach, respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Delaware, entered in the above matter on November 29, 1967, reversing the order of the Superior Court for New Castle County, and directing dismissal of petitioner's action.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The Opinion of the Superior Court for New Castle County, unreported, is printed as Appendix B hereto (p. 23). The Order of said Court denying reargument is printed as Appendix C (p. 26). The Certification by said Court to the Supreme Court of Delaware on a Question of Law is printed as Appendix D (p. 27). The Opinion of the Supreme Court of Delaware, reported at Del. , 236 A. 2d 363, is printed as Appendix E hereto (p. 31). The Notice of Order of said Court denying rehearing is printed as Appendix F hereto (p. 38). The judgment of said Supreme Court of Delaware is printed as Appendix G hereto (p. 39).

JURISDICTION.

The judgment of the Supreme Court of Delaware was entered on November 29, 1967 (p. 39). The Order denying rehearing was entered on November 28, 1967 (p. 38). On February 5, 1968, Mr. Justice William J. Brennan, Jr., entered an Order extending time for filing a petition for writ of certiorari herein to and including March 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

QUESTION PRESENTED.

A diversity suit brought in the Federal Court in Delaware, by a Pennsylvania citizen against a Delaware Corporation, upon a Pennsylvania cause of action, and timely under both Delaware and Pennsylvania law, was, after expiration of the limitation period, dismissed because the defendant's principal place of business was in Pennsylvania; and the plaintiff immediately instituted a new action in the Delaware State Court, where the limitation was pleaded. Was it not a violation of the Privileges and Immunities and the Equal Protection Clauses of the Constitution of the United States for the Delaware Court to refuse to said Pennsylvania plaintiff the benefit of the Delaware Saving Statute, which permits a party to commence a new suit within one year after a prior timely suit on the same cause has been dismissed other than upon the merits, where, in an action in the same court upon the same cause, the benefit of the Saving Statute would have been applied if plaintiff were a Delaware resident?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The provisions of the Constitution of the United States involved are: Article IV, Sec. 2, and Amendment XIV, Sec. 1, clauses 2 and 4.

The statutory provisions of Delaware involved are: Borrowing Statute, 10 Del. C. 8120; Saving Statute, 10 Del. C. 8117(a); Statute of Limitation, 10 Del. C. 8118. The statutory provision of Pennsylvania involved is: Statute of Limitation, 12 Purdon's Pa. Stat. Ann. 34.

STATEMENT OF THE CASE.

Petitioner, a resident of Pennsylvania, instituted an action in the United States District Court in Delaware, alleging serious personal injuries sustained as result of the negligence of respondent, a Delaware engineering corporation, while petitioner was working on a construction project in Pennsylvania. This action was timely under both Delaware and Pennsylvania limitations, which are two years. After extensive discovery proceedings by both parties, two years from the injury having expired, respondent moved to dismiss for lack of diversity jurisdiction, on the ground that respondent's permanent place of business was in Pennsylvania, where petitioner resided. The Federal action was therefore dismissed. Six days later, petitioner started suit in the Delaware State Court, claiming the benefit of the Delaware Saving Statute, 10 Del. C. 8117, which provides that where suit is timely begun and is dismissed other than on the merits, the plaintiff is allowed one year from the dismissal to bring another action. The lower Court held that this statute applied, and refused to dismiss, since the Federal Court action had been timely and was dismissed not on the merits, and the defendant was not prejudiced. Respondent's motion for reargument was denied. Thereupon, on motion of respondent, the issue was certified to the Supreme Court of Delaware.

The Delaware Supreme Court reversed, and dismissed the action, as barred by the limitation statute. The Court held that the Saving Statute did not apply to benefit this petitioner. Under the Court's reasoning, if petitioner had been a *Delaware* resident, the Delaware Saving Act *would* have applied; but since petitioner was a *Pennsylvanian*, it did *not* apply because Pennsylvania does not have a similar saving statute.

Petitioner thereupon filed a Petition for Rehearing with the Delaware Supreme Court, pointing out that the Court's decision denied to petitioner the benefit and protection of the Delaware Saving Act solely because he was a Pennsylvanian, and despite the fact that if he had been a Delaware citizen under identical facts, the Delaware statute would have applied. Petitioner pointed out that the decision discriminated against petitioner solely because he was from another state, and that this violated the privileges and immunities clauses and equal protection clause, Article IV, Sec. 2, and Amendment XIV, Sec. 1, Clauses 2 and 4, of the Constitution of the United States. Despite these clear violations of petitioner's Constitutional rights, the Delaware Supreme Court denied rehearing.

REASONS FOR GRANTING THE WRIT.

The Application Below of the Delaware Saving Statute Violates the Privileges and Immunities and Equal Protection Clauses of the Constitution.

Three questions were certified for decision to the Delaware Supreme Court, of which two are here relevant (29). The Court "assumed", without deciding, that the first question would be answered in the affirmative: that the Delaware Saving Statute *does* apply to a tort committed in Pennsylvania which has no equivalent Saving Statute, where suit was timely brought in a Federal Court in Delaware and dismissed after the limitation had run, for lack of diversity jurisdiction (34, 37). Under such view, it does not matter whether Pennsylvania has an equivalent saving statute. However, the Court answered the second question in the affirmative: that, although the right of action was preserved by the Saving Statute, the Delaware Borrowing Statute bars the action since it was instituted after the expiration of the two-year limitation of Pennsylvania, which has no applicable saving statute (34, 37). Thus, the Court below has applied the Borrowing Act to the Saving Act in such a manner as to make application of the latter statute depend upon whether or not the plaintiff was a resident of Delaware.

The Borrowing Statute provides a measure of limitation (here, the Pennsylvania two-year statute). Once suit was started in the Delaware Federal Court within that two years, the limitation was satisfied, and was no longer a consideration as to the instant cause of action. It is admitted that the Federal action brought by the plaintiff was timely, and the Court below has stated, in its opinion, that said Federal action was within the provisions of the Saving

Act, and that the reason for dismissal by the Federal Court was also within the purview of the Saving Act, as the type of action which the statute seeks to preserve (34). Six days after such dismissal, petitioner immediately instituted suit, upon the same cause of action, in the Delaware State Court; thus, doing everything possible to preserve the timeliness of his suit.[1] Therefore, the Saving Act, formulated for such a situation, should have been applied to preserve to petitioner his remedy in the Delaware State Court.

The Court's reasoning re-applies against the non-resident, the borrowed Pennsylvania limitation a *second* time, after it has already been satisfied in the same cause of action. This clearly violates the specific provisions of the Constitution that the citizens of each state are entitled to *all* privileges and immunities of those of the several states, and that a state may not deny to any person under its jurisdiction the *equal* protection of *all* of its laws. In refusing to the petitioner the benefit of the Saving Statute, the Court below has specifically discriminated against him solely because he is a Pennsylvanian, thus denying him equal access to the Courts of Delaware. This was a question of first impression in the Delaware Courts and review of this action is essential to prevent a compounding of this novel discrimination, which points at the heart of Federal diversity jurisdiction.

1. The Privileges and Immunities Clause.

The Constitution of the United States, Article IV, Section 2, provides that:

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1. See discussion of this significant factor by Mr. Justice Stewart, in *International Union, U. A. W. v. Hoosier Cardinal Corp.*, 383 U. S. 696, 708, 16 L. Ed. 2d 192, 201 (1966). See also, *Burnett v. New York Central R. Co.*, 380 U. S. 424, 428-30, 13 L. ed. 2d 941, 945-7 (1965), where this Court emphasized the liberality to be exercised in granting to a litigant his day in court where he "has not slept on his rights", but acted promptly after the first suit was dismissed.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

Amendment XIV, Section 1, Clause 2, provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

This Court has made it clear that this section prohibits any discrimination by any state against citizens or residents of another state, based upon the fact of non-residence. In *Toomer v. Witsell,* 334 U. S. 385, 92 L. Ed. 1460 (1948), striking down a state's discriminatory license fee for fishing boats of non-residents, this Court said, concerning the "privileges and immunities" clause: (U. S. at 396, L. Ed. at 1471)—

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. *It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.* 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. (U. S.) 168, 180, 19 L. Ed. 357, 360 (1868)." (Emphasis supplied.)

Continuing, this Court pointed out that the clause is not "an absolute", but "it does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." (U. S. at 396, L. Ed. at 1471).

To the contention that a discriminatory statute is justified because of a possibly "proper purpose", this Court emphasized that even a legitimate end does *not* justify a means which "overlooks the purpose of that clause which . . . is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a pecular source of the evil at which the statute is aimed." (U. S. at 398, L. Ed. at 1472). Such an evil does not exist in granting to this Pennsylvania petitioner his day in Court.

In the instant case, the Court below states that the justification for the residence exception to the Borrowing Statute, by reason of which the Saving Act relief was denied to plaintiff, is that the statute would prevent "forum shopping" (35). But, while the basic purpose of the Act may have been laudable, its use as a means to bar the equal application of a relief statute to a suit started before limitation had run does not serve this purpose;[2] in such application, it is a weapon of discrimination against plaintiff, *solely because of his non-residence.* The method here used "overlooks the purpose" of the Constitutional clause, which is to provide to *every* suitor within the jurisdiction of the state the *same* judicial relief, including, if provided to local residents, relief from a limitation if suit was once timely started and dismissed for other than the merits of the case. As applied by the Court below, the joint opera-

2. The purpose of preventing "forum shopping" as to any cause of action is served best by providing a "built-in" limitation within every statute granting a remedy for a right, so that the period for use of the remedy is self-executing within it, and necessarily follows the organic statute wherever it is pleaded.

tion of the two statutes in question gives only Delaware residents relief, to the exclusion of non-residents. The question of "forum shopping" is no longer an issue where the plaintiff already has started suit. The issue becomes the application of the Saving Act—a special privilege—which the Court below has limited to Delaware residents and denies to non-residents.[3]

As this Court said, in *Toomer:*

> ". . . We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." (U. S. at 399, L. Ed. at 1473).

In *Chambers v. B. & O. R. R.*, 207 U. S. 142, 52 L. Ed. 143 (1907), this Court expressed the application of the privileges and immunities clause to the right of a non-resident to sue in the courts of a state, as follows:

> ". . . The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states *to the precise extent that it is allowed to its own citizens.* Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution . . ." (U. S. at 148, L. Ed. at 146) (Emphasis supplied.)

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3. In *Toomer,* this Court noted that although the statute is "couched in terms of residence", it is not outside the scope of the privileges and immunities clause, which speaks of "citizens" (U. S. at 397, L. Ed. at 1471-72). Similarly, *Blake v. McClung,* 172 U. S. 239, 247, 43 L. Ed. 432, 435 (1898).

This Court pointed out that each state may determine the limits of jurisdiction of its courts and the type of litigation that may be heard and may determine the extent to which it will entertain transitory actions which have arisen elsewhere—

> "But any policy the state may choose to adopt *must operate in the same way on its own citizens and those of other states.* The Privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is *void,* because in conflict with the supreme law of the land." (U. S. at 149, L. Ed. at 146) (Emphasis supplied.)

Chambers involved a death action brought by citizens of Pennsylvania in the Ohio court for death in Pennsylvania of a Pennsylvanian. The Ohio death statute provided only that where the death of a citizen of Ohio was caused by wrongful act in another state where a right to damages for death is provided, such right may be enforced in Ohio. There was no other right under Ohio law to sue for death occurring in another jurisdiction. After discussing the Constitutional demand for equality of treatment in the courts, as aforesaid, this Court noted that a discrimination was thus introduced into the law of the state, but that—

> ". . . The discrimination was based solely on the citizenship of the *deceased.* The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states

which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution." (U. S. at 149-50, L. Ed. at 147) (Emphasis supplied.)

This Court thus made it clear that since the discrimination was based solely upon the citizenship of the deceased and *not* the citizenship of the *plaintiff*, there was no discrimination as to privileges to citizens of other states. But had the statute given rights to Ohio parties to the suit which were denied to parties from other states, then, obviously, the statute would have been unconstitutional. Upon this point, the Court said if a foreign statute should give the right of action for death to the deceased which would then survive to his representative, then it would be the right of action of the deceased which was brought into court, and that—

". . . as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another state, there is, in a real and substantial sense, a discrimination forbidden by the Constitution." (U. S. at 150, L. Ed. at 147)

Concluding, this Court stated that *if* such a case should arise and be denied a hearing in the Ohio courts, then, "as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not, in substance, grant privileges to Ohio citizens which it withheld from citizens of other states." (U. S. at 150, L. Ed. at 147).

Clearly, this Court there speaks of the situation which is now presented. The instant statutes, as they have herein

been applied by the Court below, discriminate against out-of-state citizens solely because of their citizenship, granting relief to Delaware suitors, and declining the same relief to Pennsylvanians. This is, "in a real and substantial sense, a discrimination forbidden by the Constitution".

It may be suggested that the position here taken would apply the privileges and immunities clause so as to prohibit the respective states from legislating even necessary or reasonable regulations required where a foreign citizen enters the state court. This is not so. This Court has expressed many situations where the forum state may and has every right to regulate the participation by foreign suitors in state courts. In *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432 (1898), Mr. Justice Harlan reviewed past decisions of the Court applying the privileges and immunities clause. While it has been consistently held that citizens of foreign states must be given the same rights as local citizens to institute and maintain actions in the courts of the state, there are proper regulations which may be made:

> ". . . For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the

> United States, by and for whom the government of the Union was ordained and established." (U. S. at 256-57, L. Ed. at 438-39)

Under the reasoning of the Court below, if plaintiff had been a Delaware resident, the Delaware Borrowing Act proviso would have been used to apply the Delaware Saving Act to the remedy and thus *extend* the time to bring suit in the State Court. But, because plaintiff was a Pennsylvanian he has been denied the equal protection of the Delaware Saving Act, and is thus deprived of his right to redress for his serious injuries. This application of the Delaware Statutes in discrimination against this out-of-state suitor is in violation of the Constitution of the United States.

The Saving Act is, by its very nature, resorted to *only after* a limitation has expired and the remedy would otherwise be barred. There is no other rationale for its existence. If plaintiff were a Delaware resident, under the same facts, this Court would have afforded him the benefit of the Saving Act, although the tort occurred in Pennsylvania, in whose forum no saving statute would be applicable. However, because plaintiff is a Pennsylvanian, the Court below has refused to apply this benefit, on the wholly irrelevant ground that Pennsylvania does not have a similar saving statute. Thus, despite the identity of the cause of action, this procedural relief has been reserved only to the benefit of Delaware citizens. This denial to the Pennsylvania plaintiff is discriminatory and unconstitutional.

2. The Equal Protection Clause.

The Constitution of the United States, Amendment XIV, Section 1, Clause 4, provides that:

> ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The same discrimination by the Court below, denying to a non-resident access to Delaware Courts, while granting access to Delaware residents under the identical circumstances, is also a direct deprivation of the equal protection of the laws of Delaware.

In *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254 (1921), the Supreme Court recognized that the same failure of equality before the law and courts of any state that violates Article 4, § 2, similarly violates the equal protection clause of the 14th Amendment. Mr. Chief Justice Taft said (U. S. at 332-33, L. Ed. at 263):

> ". . . Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law;' 'This is a government of laws, and not of men;' 'No man is above the law,'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
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> "Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

"Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct. Rep. 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:

" 'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*' "

Continuing its analysis of the equality provision of the 14th Amendment, this Court said (U. S. at 334-35, L. Ed. at 264):

"The 14th Amendment, as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The refusal to the Pennsylvania plaintiff in this case of like access to the Courts of the State of Delaware as is afforded to the residents of Delaware is thus a direct violation of the equality provision of the 14th Amendment. It is clear that "equal protection of the laws" means equal access to the Courts under the laws. It also means an equality of *operation* of the judicial machinery in enforcement of the laws. A statute which may be non-discriminatory on its face may be grossly discriminatory in operation. *Griffin v. Illinois,* 351 U. S. 12, 17(n), 100 L. Ed. 891, 898 (1956). The application by the Court below of the Delaware statutes in question is clearly unconstitutional.

This Court has said:

> "Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 348-349, 88 L. ed. 788, 792, 64 S. Ct. 582. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his right." *Burnett v. New York Cent. R. Co.,* 380 U. S. 424, 428, 13 L. ed. 2d 941, 945 (1965).

In the instant case, respondent was fully aware of the claim. The Federal action had proceeded for one year, with service of process and intensive discovery, so that the respondent was not surprised or prejudiced by the institu-

tion of the State action six days after the Federal action was dismissed. Therefore, the essential reason for limitation does not here exist. Rather, petitioner should be given his day in court, in the interest of justice, as this Court has stated:

> "This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights. . . ." *Burnett, supra,* U. S. at 428, L. ed. at 945.

CONCLUSION.

Denial to the petitioner of the benefit of the Delaware Saving Statute deprived him of the equal protection of the law in that State and denied to him the privilege granted by that law, solely because he was not a resident. This denial and deprivation were not based upon any reasonably foreseen evil that might result from giving to petitioner access to the State's courts. The test of the classification was solely petitioner's residence. Since the basis of the suit was a common-law cause of action which arose in another state, there was no Constitutional justification to deprive a resident of that other state of his day in court. Reservation of one set of laws for residents and another set for non-residents is exactly what the authors of our Constitution sought to prevent, in their quest for a unified Federal Government, as opposed to a loosely connected group of sovereign states. As Chief Justice Taft said: "the equal protection of the laws is a pledge of the protection of equal laws" to all persons within the territorial jurisdiction of the state. *Truax v. Corrigan,* 257 U. S. 312, 333, 66 L. Ed. 254, 263 (1921).

The decision of the Supreme Court of Delaware upon this issue of first impression in that State results in a specific discrimination against a non-resident plaintiff, solely because of his non-residence, in violation of the Constitutionally guaranteed hospitality of one state to residents of another. This novel discrimination should be reviewed by this Court, and reversed and remanded for further proceedings.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioners.

APPENDIX A.

Constitution of the United States.

ARTICLE IV.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

AMENDMENT XIV.

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . . nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Delaware Borrowing Statute.

10 Del. Code § 8120.

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply..

Delaware Saving Statute.

10 Del. Code § 8117(a).

(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient

service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

Delaware Statute of Limitation.

10 Del. Code § 8118.

§ 8118. Personal Injuries.

No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained. As amended 52 Del. Laws, Ch. 339, § 2, eff. July 9, 1960.

Pennsylvania Statute of Limitation.

12 Purdon's Penna. Statutes Annotated § 34.

§ 34 Limitation in Cases of Personal Injury.

Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law. 1895, June 24, P. L. 236; § 2.

APPENDIX B.

SUPERIOR COURT
STATE OF DELAWARE

George R. Wright
Associate Judge

Court House
Dover, Delaware

November 28, 1966

William D. Bailey, Jr., Esquire
Bayard, Brill, Russell & Handelman
Continental American Building
Wilmington, Delaware 19801

William Prickett, Esquire
Prickett & Prickett
1310 King Street
Wilmington, Delaware 19899

Re: Fromback v. Gilbert Associates, Inc.
CA 48, 1966

Gentlemen:

This is an action for personal injuries which resulted from an accident occurring in Pennsylvania.

The action was originally brought in the United States District Court for the District of Delaware. The action was dismissed there due to lack of jurisdiction.

The plaintiff then brought the action in this Court. The complaint indicates that the action was brought here more than two years after the plaintiff's cause of action arose but within one year after dismissal in the Federal Court. The defendant now moves for judgment on the pleadings or alternatively summary judgment.

The plaintiff is a resident of Pennsylvania. The defendant is a Delaware Corporation having its principal

place of business in Pennsylvania. These facts were clearly alleged in the complaint filed in the Federal Court and relied upon by the plaintiff in that Court as a basis of diversity jurisdiction. In fact, however, these facts result in both parties being Pennsylvanians for purposes of federal jurisdiction and the suit was therefore dismissed.

The question therefore is whether or not the plaintiff may escape the effect of 10 Del. C. § 8118 by invoking the provisions of 10 Del. C. § 8117(a).[1]

10 Del. C. § 8117(a) provides as follows:

> "(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein."

Responsible and intelligent arguments may be made in support of the position of either side. The most recent cases on the point are collected in 6 ALR 3rd 1043.

---

1. The defendant makes an argument to the effect that if 10 Del. C. § 8117 is invoked it results in the Delaware Statute of Limitations (10 Del. C. § 8118) being extended for one year and therefore requires the application of the Pennsylvania Statute of Limitations in the case, since it would be shorter, because of the provisions of 10 Del. C. § 8120. This argument cannot be considered because defendant's present motion is based upon the premise that the Delaware Statute of Limitations applies.

The latest reported Delaware decision bearing on the matter appears to be *Gosnell v. Whetsel*, 198 A. 2d 924 (1964). That case as well as an earlier Delaware case [*Giles v. Rodolico*, 1 Storey 143, 140 A. 2d 263 (1958)] involved the application of 10 Del. C. § 8117(a) due to a defect in service of the writ commencing the action, however, the language of *Gosnell* indicates that the statute is not intended to be construed so narrowly.

The Federal Court action did not touch upon the merits of the case. Moreover, there is no prejudice to the defendant here in requiring it to defend the instant action on its merits at this time. The defendant knew well within the period of limitations that the plaintiff's intention to litigate the matter was serious.

The defendant's motion for judgment on the pleadings or for summary judgment is denied.

The defendant has also filed two other motions asking dismissal of certain paragraphs of the complaint.

Paragraphs 5(a), (e), (g), (h), (n), (o), and (q) of the complaint will be ordered stricken because they fail to satisfy the requirement of particularity of pleading contained in Rule 9(b) of the Superior Court Rules—Civil.

Likewise the prayer for prejudgment interest will be stricken.

The rule against the allowance of such interest is long established and well settled in this jurisdiction.

Order accordingly.

Very truly yours,

George R. Wright

s

cc: Judges of the Superior Court
Prothonotary
Mrs. Irma Whittington

APPENDIX C.

SUPERIOR COURT
STATE OF DELAWARE

December 9, 1966

GEORGE R. WRIGHT
Associate Judge

Court House
Dover, Delaware

William D. Bailey, Jr., Esquire
Bayard, Brill, Russell & Handelman
Continental American Building
Wilmington, Delaware 19801

William Prickett, Esquire
Prickett & Prickett
1310 King Street
Wilmington, Delaware 19899

Re: Fromback v. Gilbert Associates, Inc.
CA 48, 1966

Gentlemen:

The defendant has filed a motion for reargument in connection with the above matter.

I will assume the defendant is correct in stating in its motion that the argument that the Pennsylvania Statute of Limitations applies was not considered. I do not accept the defendant's theory that the Saving Statute has the effect of lengthening the Delaware Statute of Limitations. I view this statute as a statute granting relief under certain circumstances from the Delaware Statute of Limitations.

I therefore find no merit in the defendant's argument in this connection and its motion for reargument is denied.

Very truly yours,

GEORGE R. WRIGHT

s

cc: Prothonotary, New Castle County

APPENDIX D.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH, *Plaintiff*, *v.* GILBERT ASSOCIATES, INC., *Defendant*.	CIVIL ACTION No.

CERTIFICATION TO THE SUPREME COURT ON A QUESTION OF LAW.

Pursuant to Rule 20 of the Rules of the Supreme Court, the Superior Court hereby certifies to the Supreme Court for its decision questions of law arising prior to the entry of final judgment:

The questions are certified to the Supreme Court under the following subsections of Rule 20(2):

(a) The questions of law to be certified are of first instance in this State.

(c) The questions of law to be certified relate to the construction and application of statutes of this State which have not been, but should be, settled by the Supreme Court.

(d) An interlocutory order of the Superior Court has been entered upon the determination by that Court of the questions to be certified, and a review of the interlocutory order may

(i) terminate the litigation or

(ii) avoid expenses and speed the determination of the cause.

A. Statement of the Nature of the Case.

This is a personal injury action resulting from a tort allegedly committed against a Pennsylvania resident in Pennsylvania by a Delaware corporation doing business in Pennsylvania.

B. Statement of the Facts Giving Rise to the Questions of Law Certified.

The plaintiff alleges he was injured in October, 1963 while employed upon a sewer development project in Terre Hill, Lancaster County, Pennsylvania. On August 28, 1964, the plaintiff sued Gilbert Associates, Inc., engineers, and James Julian, Inc., a contractor performing work upon the same project, both corporations of the State of Delaware, in the United States District Court for the District of Delaware (C.A. 2907).

After extensive discovery proceedings principally conducted by the plaintiff and defendant, Gilbert Associates, the action against James Julian, Inc. was dismissed by stipulation. Thereafter, in January, 1966, more than two years after the date of the commission of the tort, Gilbert moved for a dismissal for lack of diversity jurisdiction in the federal court by virtue of the fact that Gilbert had its principal place of business in Pennsylvania. This dismissal was granted.

Both the Pennsylvania and Delaware statutes of limitations for torts are two years (12 Purdon Pa. Stat. Ann. § 34; 10 Del. C., § 8118). Frombach brought an action on the same cause of action in the Delaware Superior Court.

Gilbert moved to dismiss the Superior Court action on the grounds that the Statute of Limitations had run.

Frombach pleaded the Delaware Savings Statute (10 Del. C., § 8117) alleging that the dismissal of the federal action for lack of jurisdiction allowed him one year from the dismissal of the action in the federal court within which to bring his cause of action in the Delaware State Court.

Pennsylvania has no applicable savings statute and Gilbert contended that:

The Savings Statute did not apply and even if it did the Delaware Borrowing Statute (10 Del. C., § 8120) barred the action because it would have been barred in Pennsylvania.

This motion was denied in an opinion attached hereto as Exhibit A.

Thereafter the defendant moved for reargument, which motion was, in turn, denied by this Court in an opinion attached hereto as Exhibit B.

On , 1967, this Court entered an order on its opinion denying the motion for summary judgment and the motion for reargument (Exhibit C).

C. A Concise Statement of the Questions of Law to Be Heard and Determined by the Supreme Court.

I. Does the Delaware Savings Statute (10 Del. C. Section 8117) apply in a case where a tort is committed in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the federal court of Delaware, and is dismissed after the running of the Statute of Limitations (10 Del. C. Section 8118) for lack of diversity of citizenship jurisdiction?

II. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. Section 8120) bar the right of action if it arises out of a

tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

III. Does Section (b) of the Statute (10 Del. C. Section 8117) preclude the defendant from raising the defense that the action has been barred by the running of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?

D. Reason or Reasons of the Court Below for Certification of the Questions to the Supreme Court.

The question presented is one of first impression in this State. The construction of several Delaware statutes are involved which have not previously been construed together. The Supreme Court should pass on the questions so that the law of the State of Delaware on this question will be known and, should the defendant prevail, the parties will be spared a lengthy and expensive trial.

E. Recommendation as to Order of Filing Briefs.

It is recommended that the defendant file the first brief.

/s/ Geo. R. Wright, *J.*

Approved as to Form:

/s/ Milton M. Borowsky,
Milton M. Borowsky, Esquire
Attorney for Plaintiff.

Prickett, Ward, Burt & Sanders,
Rodman Ward, Jr.,
Rodman Ward, Jr.,
Attorneys for Gilbert Associates.

(Opinion of the Superior Court and Order denying reargument, attached as exhibits, are not here reprinted, since they are printed hereinabove, as Appendix B and C, respectively.)

APPENDIX E.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH,
Plaintiff,

v.

GILBERT ASSOCIATES, INC.,
Defendant.

No. 42, 1967.

(November 10, 1967.)

WOLCOTT, *Chief Justice;* CAREY, *Justice;* and SHORT, *Vice-Chancellor,* sitting.

Arthur Inden, of Young, Conaway, Stargatt & Taylor, Wilmington; Milton M. Borowsky, of Freedman, Borowsky and Lorry, of the Pennsylvania Bar, for plaintiff.

William Prickett and Rodman Ward, Jr., of Prickett, Ward, Burt and Sanders, Wilmington, for defendant.

CAREY, *J.:*

This case comes to us upon certification by the Superior Court. We accepted it because the questions raised are of first impression in Delaware and a determination in defendant's favor will terminate the case, thus avoiding a lengthy and expensive trial.

The questions certified are these:

"I. Does the Delaware Savings Statute (10 Del. C. Section 8117) apply in a case where a tort is com-

mitted in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the federal court of Delaware, and is dismissed after the running of the Statute of Limitations (10 Del. C. Section 8118) for lack of diversity of citizenship jurisdiction?

I. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. Section 8120) bar the right of action if it arises out of a tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

III. Does Section (b) of the Statute (10 Del. C. Section 8117) preclude the defendant from raising the defense that the action has been barred by the running of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?"

The action is a suit brought by a resident of Pennsylvania based upon alleged negligence which caused bodily injuries to the plaintiff. Those injuries were sustained in October, 1963 in Pennsylvania. Suit was first instituted in the Federal District Court for Delaware against the present defendant and another corporation. After extensive discovery proceedings, by stipulation the case was dismissed as to the other defendant. That dismissal deprived the Federal Court of its diversity jurisdiction and, on motion of defendant, the action was dismissed entirely in 1966. The plaintiff promptly commenced the present suit, and defendant moved for a dismissal on the ground that it is barred by the statute of limitations. The Court below denied the motion but filed this certification.

T. 10 Del. C. § 8118 bars actions for personal injuries after two years from the sustaining thereof. T. 10 Del. C. § 8117(a) reads as follows:

"(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein".

T. 10 Del. C. § 8120, our Borrowing act, reads as follows:

"Where a cause of action arises outside of this State, an action can not be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply".

The parties are in apparent agreement as to certain principles: (1) limitations of actions are determined by the law of the forum; (2) our Borrowing statute requires that Pennsylvania law be looked to as setting the time limit for the bringing of the action, if that period is shorter than the Delaware period; (3) the length of time allowed by Penn-

sylvania is two years from the date of the accident; (4) Pennsylvania's Savings Statute would not toll its limitation under the facts of this case.*

We will assume, without deciding, that plaintiff is correct in certain of his contentions under question No. I. We thus accept his argument that the commencement of a suit in the Federal District Court for Delaware is equivalent to one brought in our Superior Court, within the meaning of our Savings statute (§ 8117); that the reason for dismissal of the Federal Court action is within the scope of that section; and that, therefore, if the tort had occurred in Delaware, the present suit would not be barred. We refrain from deciding those contentions because of our views concerning the Borrowing statute.

Plaintiff argues under question II that, under the assumptions we have made, § 8117 permits the bringing of this second suit because the only prerequisite to the application of that section is that the prior suit be brought within the proper time and later dismissed for one of the reasons therein listed; and, if that prerequisite exists, the new suit is permissible, wherefore § 8120 has no application. We think the opposite conclusion is required by the history of the act, its purpose, and the decisional law.

The Savings statute has been a part of Delaware law, with no change presently significant, since 1829. 7 Del. L. 166. At that time, we had no Borrowing statute; § 8120 was not enacted until 1947. 46 Del. L. 689. Any inconsistency or conflict between those two sections would ordinarily be resolved in favor of the latter one, under the theory of implied amendment or partial repealer. The legislators in 1947 must have been aware of § 8117; if they had

* The Pennsylvania Savings Act (12 Purdon's Pa. Stat. Ann. § 33) applies only where a judgment s reversed or where judgment is entered against the plaintiff after a verdict in his favor.

intended to except from § 8120 cases brought under the authority of § 8117, they could easily have said so. Their failure to set forth any such exception naturally leads to the conclusion that they intended none. Cf. *Glassberg v. Boyd*, 35 Del. Ch. 293, 116 A. 2d 711.

The purpose of § 8120 was discussed in *Pack v. Beech Aircraft Corp.*, 11 Terry 413, 132 A. 2d 54. This Court said:

> "It is . . . ., an act to prevent 'forum-shopping'. If a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with him if the foreign statute prescribes a shorter time than the domestic statute" . . . .
>
> "On its face, therefore, the general purpose of the statute is to shorten the period of limitation applicable to actions arising in foreign jurisdictions if the foreign statute specifies a shorter period; with a proviso, however, that the rights of a certain class of residents shall be unaffected by the change. Such, we think, is the clear and obvious meaning of the statute".

Similar reasons were assigned in *Cope v. Anderson*, 67 S. C. 1340, 331 U. S. 461. The method of accomplishing that purpose and the extent to which it applies are matters for legislative determination within constitutional bounds. We have no basis for saying that the present suit does not come within the object which our Legislature sought to accomplish, or that it is not within the bounds which it intended to prescribe; we cannot create an exception which the lawmakers did not see fit to prescribe. *Lewis v. Pawnee Bill's Wild West Co.*, 5 Penn. 397, 61 A. 868, affd. 6 Penn. 316, 66 A. 471.

Decisions elsewhere have held under various types of Borrowing statutes that, in determining whether an action

is barred in the state where the cause arose, the Court looks not to its own Savings act, but to that of the situs. The theory is that the borrowed statute is accepted with all its accoutrements. *American Surety Co. v. Gainfort,* 219 F. 2d 111; *Wilt v. Smack,* 147 F. Supp. 700; *Hilliard v. Pa. Railroad Co.,* 73 F. 2d 473; *McGrath v. Helena Rubenstein, Inc.,* 29 F. Supp. 822; *Momand v. Universal Film Exchanges,* 172 F. 2d 37; *Farrell v. Employer's Liab. Assur. Corp.,* 190 A. 466, 474. There are cases taking the opposite view. *Payne v. Kirchwehm,* 48 N. E. 2d 224; and *Wright v. New York Underwriter's Ins. Co.,* 1 F. Supp. 663, are examples. We do not accept the latter rule for the simple reason that we do not understand how we can determine the "time limited by the law" of the foreign state without including any exception which exists to the limitation rule of that state.

In the present case, concededly the Pennsylvania act would not toll its limitation under the circumstances here. We are, therefore, of the opinion that the suit is barred under our Borrowing statute since the time limit in that state is shorter than the Delaware limit.

A final argument must be considered. Plaintiff contends that T. 10 Del. C. § 8117(b) prevents this Court from reviewing the ruling which the Superior Court made in his favor. The paragraph reads as follows:

> "If in the original action, the benefit of this chapter is pleaded, and a verdict upon such defense is found for the plaintiff, such verdict shall be conclusive evidence that the original action was commenced within the time limited therefor."

Plaintiff reads the words "original action" as referring to the present suit. This is not correct. All of § 8117 deals with the bringing of a new suit after dismissal of a prior one. Clearly, § 8117(b) refers to a decision made in

the first suit which is the "original action". The paragraph is designed to prevent a defendant from raising, in the second suit, the argument that the first one was brought too late, where that very question was pleaded in the first suit and a verdict on the point rendered in the plaintiff's favor. The paragraph has no application whatever to the present case.

Assuming, without deciding, that our answer to question No. I would be "Yes", our answer to question No. II is "Yes"; our answer to No. III is "No".

The order entered below must be reversed and a dismissal directed.

APPENDIX F.

SUPREME COURT OF DELAWARE

T. E. Townsend, Jr.
Clerk

Old State House
Dover, Delaware

November 28, 1967

Arthur Inden, Esquire
Bank of Delaware Building
Wilmington, Delaware

William Prickett, Esquire
Box 1328
Wilmington, Delaware

Re: Frombach v. Gilbert Associates, No. 42, 1967

Dear Sirs:

This letter to notify you that the Court has denied the petition for reargument in the above case. An Order will be sent to the court below shortly.

Yours very truly,

T. E. TOWNSEND, JR.

APPENDIX G.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH *v.* GILBERT ASSOCIATES, INC.	No. 42, 1967

ORDER.

AND NOW, TO WIT, this 29th day of November, 1967 this Court having approved the above proceeding on certification instituted in the Superior Court in and for New Castle County, by virtue of which proceeding the following questions of law were certified for hearing and determinations:

"1. Does the Delaware Savings Statute (10 Del. C. § 8117) apply in a case where a tort is committed in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the Federal Court of Delaware and is dismissed after the running of the Statute of Limitations (10 Del. C. § 8118) for lack of diversity of citizenship jurisdiction?

2. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. § 8120) bar the right of action if it arises out of a tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

3. Does Section (b) of the Statute (10 Del. C. § 8117) preclude the defendant from raising the defense that the action has been barred by the running

of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?"

IT IS ORDERED:

The first certified question is unanswered.

The second certified question is answered in the affirmative.

The third certified question is answered in the negative.

The order of the Court below entered April 19, 1967 is reversed insofar as it denies defendant's motion for summary judgment and the Court below is directed to enter judgment in defendant's favor, pursuant to the opinion of this Court dated November 10th, 1967.

IT IS FURTHER ORDERED that the Clerk of this Court transmit to the Clerk of the Superior Court in and for New Castle County a certified copy of this order together with a certified statement of the costs in this Court to be taxed as a part of the costs below.

DANIEL F. WOLCOTT, *C. J.*

JAMES B. CAREY, *J.*

ISAAC D. SHORT, II, *V. C.*

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SUPREME COURT, U. S.

FILED
APR 22 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1265

WILLIAM J. FROMBACH, *Petitioner,*

v.

GILBERT ASSOCIATES, INC.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

---

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Respondent.

WILLIAM PRICKETT,
RODMAN WARD, JR.,
P. O. Box 1328,
Wilmington, Delaware 19899,
Of Counsel.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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v.

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On Petition for a Writ of Certiorari to the Supreme Court of Delaware

---

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Inasmuch as the federal question tendered in this case was not timely raised and has in any event long since been foreclosed by this Court, extended or elaborate opposition to the present petition would be inappropriate.

Briefly, after a diversity action brought in the United States District Court for the District of Delaware for personal injuries suffered in Pennsylvania had been dismissed

—because the respondent Delaware corporation had its principal place of business in Pennsylvania, where petitioner also resided, see 28 U.S.C. § 1332(c) as amended in 1958—petitioner then brought the identical action in the Superior Court of the State of Delaware.

By that time, the normal two year Delaware statute of limitations in tort actions had run (10 Del. Code § 8118; Pet. 22), but petitioner sought and obtained in the Superior Court a determination that he was entitled to the benefits of the savings statute (10 Del. Code § 8117(a); Pet. 21-22), which tolls limitations where dismissal does not involve the merits (Pet. 23-26).

Thereafter, under the Delaware practice, the Superior Court certified to the Supreme Court of Delaware three questions relating to the construction of the Delaware statutes of limitations (Pet. 27-30), of which only the first two are now relevant.

The first question (Pet. 29, 31-32) was whether the Delaware Savings Statute (10 Del. Code § 8117(a); Pet. 21-22) was applicable in respect of a tort committed in Pennsylvania, a jurisdiction which has no similar savings provision (Pet. 29). The Supreme Court of Delaware assumed that the answer was Yes (Pet. 34, 37).

The second and decisive question (Pet. 29-30, 32) was whether, assuming survival of the cause of action, the Delaware Borrowing Statute (10 Del. Code § 8120; Pet. 21, 33) barred the action if it arose out of a tort committed in a jurisdiction having a two year limitation without any savings provision.

The Delaware Borrowing Statute provides:

> "Where a cause of action arises outside of this State, an action can not be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing

> an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."

The parties having conceded that, under the Delaware Borrowing Statute, Pennsylvania law must be looked to as setting the time limit, which is a two year period (Pet. 33-34), the Supreme Court of Delaware decided, purely as a matter of Delaware law, that the Delaware Borrowing Statute barred the action (Pet. 34-36, 37).

Petitioner in his brief in the Supreme Court dealt with the construction of the Delaware Borrowing Statute simply as a matter of State law and statutory construction; he made no contentions under the Constitution of the United States. It was only after decision had gone against him in the highest court of Delaware that he raised Federal constitutional questions in his petition for rehearing—which was denied without opinion (Pet. 38).

We have filed with the Clerk a certified copy of petitioner's brief in the Supreme Court of Delaware and of his petition for rehearing, the terms of which fully substantiate the foregoing.*

Accordingly, for at least two reasons, further review here should be denied.

---

* Petitioner concedes, at least inferentially, that he did not raise the Federal question prior to his petition for rehearing in the Supreme Court of Delaware. See Pet. 5, also p. 2 of his Application for Extension of Time within which to file Petition for Writ of Certiorari.

Significantly, the petition for certiorari herein does not comply with this Court's Rule 23(1)(f), which requires that, where review of the judgment of a state court is sought, there be specifically set forth the stage in the proceedings at which the federal questions were raised, and the way in which they were passed upon by the state court, in order to "show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

First. It has long been the settled law of this Court that, where a Federal question is first raised on petition for rehearing in a State court, and where the State court does not then consider the Federal question, there is no basis for review: the Federal question has been raised too late. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128, and cases cited; *Hanson* v. *Denckla,* 357 U.S. 235, 243-244. Simply to show that the possibility has not been overlooked, we note that in the present case there is not the slightest intimation that this is a "surprise" situation within the rule of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673.

Second. But there is here no occasion to fear that the jurisdictional infirmity in the record has deprived petitioner of any substantial rights. To the contrary, even if it be assumed simply for purposes of argument that his Federal question had been timely and properly raised, it would have availed him nothing. For the very point now urged has long since been rejected by this Court.

In *Canadian Northern R. Co.* v. *Eggen,* 252 U.S. 553, there was involved the validity of a Minnesota statute that provided—

> "When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

This Court unanimously reversed the Eighth Circuit, which had held that the foregoing provision violated the Privileges and Immunities Clause on the footing that it discriminated against a nonresident plaintiff. This Court, pointing out (252 U.S. 561) that "The discrimination of which he complains could arise only from his own neglect," upheld the statute; Mr. Justice Clarke said (p. 563):

> "The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of

> enforcing any right which he may have had, for a year, —as long a time as was given him for that purpose by the laws under which he chose to live and work,—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate, and the statute is a valid law."

The *Eggen* case, which is plainly dispositive of the present situation (where, indeed, a period of limitations twice as long was available), has never been qualified here in any way. Accordingly, even if the Supreme Court of Delaware had actually passed upon petitioner's present contention, he could not succeed.

Indeed, having in mind the well settled rule (e.g., *McGowan* v. *Maryland*, 366 U.S. 420, 426) that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," it is plain that the *Eggen* decision also disposes of all that petitioner has now belatedly adduced under the Equal Protection Clause.

For these reasons it is respectfully submitted that the present petition for a writ of certiorari should be denied.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Respondent.

WILLIAM PRICKETT,
RODMAN WARD, JR.,
P. O. Box 1328,
Wilmington, Delaware 19899,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1265.

WILLIAM J. FROMBACH,

Petitioner,

v.

GILBERT ASSOCIATES, INC.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION.

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
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Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1265.

WILLIAM J. FROMBACH,

Petitioner,

v.

GILBERT ASSOCIATES, INC.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent has filed a Memorandum in Opposition to Petition for Writ of Certiorari, raising a procedural and substantive issue which is wholly without basis in fact or law.

Respondent contends that since the Federal questions herein were first raised on Petition for Rehearing to the Supreme Court of Delaware, there is no basis for review. As set forth in the Petition for Certiorari, page 5, the questions were raised by Petitioner as soon as they came into the case. The application of the Delaware statutes in violation of the Constitution first occurred in the decision of the Delaware Supreme Court, whereupon they were

immediately called to the Court's attention by Petition for Rehearing. The trial court had applied the Delaware statutes in favor of Petitioner, without discrimination because of his citizenship, so that the Constitutional issue had not theretofore arisen.

Upon this point, respondent cites *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 128, 89 L. Ed. 2092, 2099-2100 (1945). But, there, the Petitioners had waited until after the Nebraska Supreme Court had filed its opinion to contend for the first time in a Motion for Rehearing, that the Court was without jurisdiction over the subject matter —a situation which had existed from the start. The Nebraska Court, upon rehearing, pointed out that such a jurisdictional claim was "contrary to the pleadings filed", as well. However, in the instant case, there was no Constitutional issue to raise until the Delaware Supreme Court had filed its opinion applying the Delaware statutes as it did, for the first time in this case. This Federal question was timely raised upon Petition for Rehearing "since it was raised at the first opportunity", as in *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U. S. 673, 677-78, 74 L. Ed. 1107, 1112 (1930).*

Respondent argues, also, that this Court has already decided the issue herein presented adversely to Petitioner in *Canadian Northern R. Co. v. Eggen,* 252 U. S. 553, 64 L. Ed. 713 (1920). In that case, this Court sustained the constitutionality of a state borrowing statute, which protected from a shorter foreign limitation period a foreign

* Respondent states that the Petition herein does not comply with this Court's Rule 23(1)(f), since it does not specifically set forth the stage in the proceedings below where the federal questions were raised. Respondent is incorrect. The Petition for Certiorari, on page 5, sets forth specifically that the Constitutional questions were raised in the Petition for Rehearing before the Delaware Supreme Court, and that the Supreme Court denied rehearing. Appendix F to the Petition (page 38) embodies the two sentence notification of denial of rehearing.

cause of action held by a citizen of the forum state. In other words, this Court held that a non-resident plaintiff who was not diligent in starting suit is not denied his Constitutional rights if his foreign cause of action is held to be subject to the foreign statute of limitation which is shorter than the limitation of the forum, while a resident plaintiff would *not* be barred by the shorter period. This is not the instant case, however. In the instant case, separate and apart from the Delaware Borrowing Statute, was a specific Saving Statute which gave a plaintiff, who has not slept on his rights, an additional year to start a second action where the first, timely, action was dismissed other than on the merits. In the instant case, the Delaware Court has denied to Petitioner who *had* started suit in time access to its Courts, by means of applying its Saving Statute discriminatorily. The limitation had already been satisfied by the first suit which had been dismissed, and, except for his non-residence, his cause would have been saved.

It is respectfully submitted that the discriminatory application of the combined Delaware Statutes violated the Constitution of the United States, and should be reviewed by this Court, and reversed and remanded.

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